May 3, 2005

Editorial

"Democrats in error on judicial filibusters," by Senator Jim Bunning, Kentucky Post, 5/2/05

"Judge doesn't deserve the Dixiecrat treatment," by Harold Johnson, Timothy Sandefur San Francisco Chronicle, 5/2/05

Maine has no use for filibusters, by Michael A. Duddy, Portland Press Herald, 5/2/05

Then & Now

Then

***The New York Times* On The Filibuster, Circa 1995: "[It] Has Become The Tool Of The Sore Loser, Dooming Any Measure That Cannot Command The 60 Required Votes."** (Editorial, "Time To Retire The Filibuster," *The New York Times*, January 1, 1995)

Now

***The New York Times* Calls Ending Unprecedented Filibusters Of Judicial Nominees "An Assault On Checks And Balances" And A "Power Grab."** "The Senate majority leader, Bill Frist, wants Senate Democrats to accept a deal that would strip away their role in approving the most important federal judicial nominees. His proposal is an assault on checks and balances, and a power grab. Democrats should not go along." (Editorial, "A No-Compromise Compromise," *The New York Times*, May 3, 2005)

Democrats in error on judicial filibusters

KENTUCKY POST, By Senator Jim Bunning, May 2, 2005

The United States Senate faces an unprecedented crisis brought on by the minority party. Judges who have been nominated by the president of the United States to the federal bench have been held up by a filibuster and cannot get a fair up-or-down vote. This unfair tactic is breaking years of Senate tradition.

You may have seen Frank Capra's movie "Mr. Smith Goes to Washington" in which Jimmy Stewart's character filibusters the Senate to fight for what is right. The argument that is currently being played out in the media is that Senate Republicans want to end the filibuster altogether. That presumption is categorically untrue. The filibuster when used for legislative purposes is a great tool that leads to compromises. However, when the filibuster is used to hold up judicial nominations, it is the tool of obstructionism.

In Article II, Section 2, of the Constitution, the president is given the power to nominate judges. And upon the "Advice and Consent" of the Senate, those nominees shall be placed on the bench. So the president alone has the power to pick judges. And the Senate has the responsibility to render its advice and consent through an up-or-down vote on the Senate floor.

When a filibuster is instituted it takes a three-fifths vote to put a stop to it. The framers of the Constitution were pretty clear when they required more than a majority to act. For example, they required a two-thirds vote to amend the Constitution. They required a two-thirds vote to convict and remove from office an impeached president or federal official. But even more telling, in the very same sentence of the Constitution that gives the Senate the duty to render advice and consent on nominations, the framers also required a two-thirds vote to approve a treaty.

Now, if the framers meant that a super-majority vote was required to approve a nominee, then they would have clearly stated so. Today, President Bush's nominees - who all have majority support - are being denied a vote by a partisan filibuster led by the Senate Democrat leadership. That is unprecedented obstructionism and must come to an end.

Previous Senates have not even considered filibustering nominees. The rules do not explicitly prohibit it because Senate tradition has always been to allow the nominee, no matter how controversial, an up-or-down vote, because that is what the Constitution dictates.

When President Bill Clinton ran into trouble with his nominees to the 9th Circuit, many Republicans wanted to do everything in their power to stop the nominations. But the majority leader at the time, Sen. Trent Lott, said this was wrong and filed cloture himself to move the nominations forward for an up-or-down vote.

The issue of blatant obstructionism the Democrats are displaying should not be ignored anymore. I support a change in the rules of the Senate to allow for an up-or-down vote on judicial nominations. We must not let the minority party circumvent the Constitution, and

take away the right of the president to have his judicial nominees voted on by a simple up-or-down vote.

-- *Republican Jim Bunning of Southgate represents Kentucky in the U.S. Senate.*

Judge doesn't deserve the Dixiecrat treatment , San Francisco Chronicle
Harold Johnson, Timothy Sandefur, Monday, May 2, 2005

Will Senate Democrats use the "Strom Thurmond option" against California Supreme Court Justice Janice Rogers Brown? Will they try to block her nomination to a federal appeals court with a filibuster -- the tactic made infamous by the late Sen. Thurmond of South Carolina and other segregationists when they battled civil-rights bills back in the 1950s and '60s?

If they do, they will give Republicans ammunition for the "nuclear" strategy of ending filibusters for all judicial nominees. The sight of self- described liberal senators insisting on a supermajority, instead of the traditional up-or-down vote, in order to deny a promotion to a brilliant black female judge, may not go well with the public. It could make the "nuclear option" appear not so radical after all.

To be sure, many of Brown's conservative supporters can be accused of playing the race card. They like to emphasize her background as the daughter of an Alabama sharecropper in the segregated South, someone who overcame poverty and bigotry to become a leader of her profession.

Both sides should focus more on Brown's actual record and ideas. They will discover a jurist of insight and integrity -- and learn valuable lessons about the judiciary's proper role in a government system dedicated to individual rights.

Conservatives believe a judge's task is to apply the law while resisting temptation to become a policy-maker. Brown's understanding is more expansive. Although she insists courts should not act like legislatures, she rejects any notion of the judge as a rubber stamp for whatever the majority does. She believes that courts should function, first and last, as defenders of freedom.

Consider her dissent in San Remo Hotel vs. San Francisco (2002), a case that upheld the extortionate fee that San Francisco charges owners of small residential hotels if they want to rent rooms to tourists instead of housing the homeless. Brown noted that these mostly mom-and-pop businesses are "a relatively powerless group" that have been arbitrarily singled out for social- welfare duty. The Fifth Amendment, she observed, prohibits government from forcing "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

She reminded her colleagues that "the free use of private property is just as important as ... speech, the press, or the free exercise of religion."

Brown's judicial philosophy represents what political scientists call the "Madisonian" view -- the idea, embraced by the "Father of the Constitution" (James Madison), that public officials must answer not just to the written law but also to principles of justice. Courts must ensure that the majority does not run roughshod over groups that are unpopular or lack political power. As Brown has put it, judges "must vigorously resist encroachments that heighten the potential for arbitrary government action."

Her libertarian impulse was displayed in her dissent in People vs. McKay (2002), concerning a bicyclist, riding against traffic, who was pulled over by police. When the cyclist failed to produce identification, he was arrested and searched. The court's decision upholding this action, Brown concluded, stretched Fourth Amendment protections to the breaking point. "If full custodial arrest is authorized for trivial offenses, the power to search should be constrained," she wrote.

She also saw a larger issue, involving race: "I do not know Mr. McKay's ethnic background. One thing I would bet on: he was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes -- places where no resident would be arrested for riding the 'wrong way' on a bicycle whether he had his driver's license or not. Well ... it would not get anyone arrested unless he looked like he did not belong in the neighborhood."

Brown's belief that no one should be treated less equally because of skin color is recorded most strongly in Hi-Voltage Wireworks vs. San Jose, a 2000 case that enforced Proposition 209, the measure banning race and sex favoritism by state and local government. She wrote the controlling opinion striking down a public-works program that gave preferential treatment based on race. She quoted the late Yale Law School Professor Alexander Bickel: "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." Prop. 209, Brown wrote, embodies the civil-rights principle: "equal opportunity for all individuals," not "entitlement based on group representation."

Brown is committed to racial equality because she is committed to individual rights and protecting individuals -- of all colors -- from government abuse. Just as small hotel owners of San Francisco should be free from unjustified coercion, and no contractor should be denied business because of race, so the cyclist McKay should be free from arbitrary treatment by police.

A jurist with Brown's pedigree and principles should not be disrespected. U.S. Senate Democrats will be making a mistake if they give her a filibuster instead of fairness.

Harold Johnson and Timothy Sandefur are attorneys with Pacific Legal Foundation (www.pacificlegal.org), which represented the successful plaintiffs in Hi-Voltage Wireworks vs. San Jose.

Maine has no use for filibusters, by Michael A. Duddy, Portland Press Herald, 5/2/05

As the looming showdown over filibustering some of President Bush's judicial nominations draws closer to a culmination, the terms of the debate become more strident but less enlightening.

Within Maine, however, a good case can be made that Maine's historical precedent, Maine's own judicial confirmation process and Mainers' own sense of decency all support a rule change to prevent judicial filibusters in the U.S. Senate.

Thomas Brackett Reed of Portland served in the U.S. House of Representatives from 1877 to 1899. In 1889, while Reed was serving in one of his two stints as speaker of the House, Reed ended the practice then known as the "silent filibuster."

The silent filibuster - refusing to answer during the roll call - was used by the minority to defeat a quorum, thereby preventing the House from conducting business.

Reed, however, ordered the clerk to record the names of members physically present, even if they were silent. A great debate then ensued, which lasted for several days. Reed was pilloried from both sides of the aisle and earned the nickname "Czar Reed."

Nevertheless, Reed's principled stand against the silent filibuster is part of Maine's legacy to the nation, and provides a uniquely historical Maine precedent for eliminating the filibuster of judicial nominees.

Much of the national debate today involves a discussion about whether majority or minority rights should prevail in the judicial confirmation process.

Interestingly, at the state level, the Maine Constitution and legislative practice firmly support the rights of the majority to control the outcome of judicial nominations.

Under our state constitution, the governor nominates judicial officers subject to confirmation by a majority vote of a legislative committee comprised of members of both houses. The party in the majority controls the composition of the committee, and thus determines the outcome.

Although the committee's vote "shall be reviewed by the Senate," it takes a 2/3 majority to override the committee recommendation. In other words, the minority doesn't stand a chance.

RULES PROHIBIT THEM

Moreover, the parliamentary rules of both the Maine Senate and House prevent the filibuster of a judicial nomination (or anything else, for that matter).

Accordingly, the values embodied in the Maine Constitution and legislative practice favor doing away with judicial filibusters at the national level.

Gov. Baldacci has recently nominated lawyer Warren Silver of Bangor to the Maine Supreme Judicial Court. Silver is a wonderful person and a wonderful lawyer, and he deserves a swift and successful confirmation process.

Silver is, however, the personal attorney for the governor and the personal attorney for at least one major donor to the Democratic Party.

Suppose the Maine Senate did allow for filibusters. Can you imagine the reaction among Maine citizens if the minority party filibustered Silver's nomination? Mainers' sense of decency and fair play would not stand for such a tactic.

PEOPLE ARE DIFFERENT

The point is that filibustering legislation is inherently different from filibustering people. People have jobs, families, reputations and lives to get on with. The political process has already become so acrimonious at the national level that many good people simply refuse to get involved.

Permitting filibusters of real people nominated to serve as judges extends political acrimony to a realm where it doesn't belong, and can only chill the willingness of good people of diverse political views to step forward and be nominated.

All of the individuals nominated by this president, but filibustered or threatened with filibusters, are good people and good citizens.

They have all achieved professional success, have earned the respect of their peers, and have been given "highly qualified" or "qualified" ratings by the American Bar Association.

One may or may not agree with the nominees' judicial philosophy or politics. However, Maine history, the values embodied in our own nomination process and Mainers' sense of decency require that they be given a prompt and fair up-or-down vote in the U.S. Senate.